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In The Supreme Court of The United States

OCTOBER TERM, 1963

ALBERT AGOBIAN and
ALBERT EGISHIAN,

Petitioners,

vs.

UNITED STATES OF
AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. ____

ALBERT AGOBIAN and
ALBERT EGISHIAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Albert Agobian and Albert Egishian, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on October 16, 1963.

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals of October 16, 1963 is not reported at this date but is set forth in Appendix A, infra, page 15.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 16, 1963, and is set forth in Appendix B, infra, page 21. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Rule 22(2) Rules of the Supreme Court and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Is Title 21, U.S.C. Section 174 under which petitioners were indicted and convicted invalid and unconstitutional under the provisions of the Fifth Amendment to the Constitution of the United States in providing that whenever on trial for a violation of said statute the defendant is shown to have or have had possession of the narcotic and that such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury?

STATUTES INVOLVED

The statutory provision involved here is Title 21, U.S.C. Section 174. This statute is set out verbatim in Appendix C, infra, page 22.

STATEMENT

The indictment returned against petitioners by the Grand Jury for the Central Division of the Southern District of California charged that on or about March 28, 1962, in Los Angeles County petitioners knowingly and unlawfully received, concealed and facilitated the concealment and transportation of one gram 370 milligrams of heroin, which the petitioners then and there well knew previously had been imported into the United States contrary to law (C. T. 2). /References to the Clerk's Transcript are hereinafter designated C. T., and references to the Reporter's Transcript are hereinafter designated R. T./

Jury trial was commenced before the Honorable William C. Mathes on Tuesday, September 18, 1962 (C. T. 24; R. T. 3). At the close of the Government's case in chief both petitioners moved for a judgment of acquittal, which motions were denied (C. T. 25; R. T. 226). Petitioners rested; both renewed the motions for acquittal, which renewed motions were denied as to each petitioner (R. T. 238, 239). On Thursday, September 20, 1962, a verdict of guilty was returned as to each petitioner (R. T. 286, 287).

On October 5, 1962, pursuant to leave of court motions on behalf of both petitioners for a new trial were presented (R. T. 300, 301; C. T. 27), and said motions were denied as to each petitioner (R. T. 311; C. T. 27). On the same date petitioners were committed to the custody of the Attorney General for a period of ten (10) years (R. T. 319; C. T. 28, 29). Both appellants filed timely notices of appeal on October 12, 1962 (C. T. 30, 31). An appeal duly followed to the Court of Appeals

for the Ninth Circuit, which court affirmed the judgment of the District Court. This petition seeks review of the court's action in denying the relief sought by appeal.

The evidence adduced as to petitioners during the trial was as follows:

Ronald Rojas was contacted at his home on March 26, 1962, at 8:00 or 9:00 p.m. (R.T. 26) Rojas was identified by officers who participated in the investigation as an informer (R.T. 62) or a special employee (R.T. 159). He had previously been arrested for addiction (R.T. 59) and had been observed under the influence of narcotics at a time previous to the time of the incident with which the instant appeal is concerned. (R.T. 89). On March 26, 1962, petitioner Egishian came into Rojas' home and asked the latter to come outside. The two went outside and both sat in Egishian's car and talked in the presence of petitioner Agobian. (R.T. 27). One or the other of petitioners asked Rojas whether he could get rid of some heroin and Agobian informed Rojas that he, Agobian, had a certain amount of heroin he was attempting to sell. (R.T. 29). Rojas advised he could sell some of the heroin and they arranged a meeting for the following night. (R.T. 30).

The next evening Agobian and Egishian picked Rojas up at his home around 8:00 or 9:00 p.m. and drove to the residence of Egishian where they went into the garage. (R.T. 31). Qualifying his testimony with "I believe", Rojas testified Agobian produced what seemed to be loose heroin in a rubber container. (R.T. 31). Egishian went into the house to get milk sugar and produced a jar. (R.T. 31). Rojas and Agobian mixed both substances in the jar and the total amount after mixing was approximately

one ounce. (R. T. 32). A meeting was then arranged for the following evening. (R. T. 32).

The following evening, March 28, 1962, petitioners met Rojas about 6:00 p. m. in front of Rojas' place of employment which is a men's clothing store. (R. T. 33). They arrived in a powder blue 1941 Cadillac belonging to Egishian and all three proceeded to the residence of Rojas. (R. T. 34). At that time Rojas was advised they did not have the heroin and he instructed them to leave him at his place of residence and go get the heroin. Earlier in the day of March 28, 1962, Rojas had contacted Sgt. Cook and Officer Weldon of the Sheriff's Narcotic Detail. (R. T. 35). At a later time Rojas observed petitioners in the alley in the same powder blue 1941 Cadillac. (R. T. 36). Rojas admitted that he was a user of narcotics in March of 1962, (R. T. 45) but did not recall whether he had used on March 28, 1962. (R. T. 48).

The events which commenced with meeting Rojas at his place of employment at approximately 6:00 p. m. on March 28 and continued thereafter were surveilled and participated in to varying degrees by officers of federal and state investigating agencies including Penn R. Weldon of the Sheriff's Office (R. T. 53); William D. Stoops of the Sheriff's Office (R. T. 67); Jim Henry of the Sheriff's Office (R. T. 105); Raymond Velasquez of the Sheriff's Office (R. T. 63); and agents Richard Rock and Francis Briggs of the Federal Bureau of Narcotics (R. T. 137, 215).

Deputies Weldon and Stoops observed petitioners circling the area of Rojas' employment at approximately 6:00 p. m. on March 28, 1962. (R. T. 54, 57). The

officers were there because of the fact their agency had previously been contacted by Rojas. (R. T. 54). Rojas was observed entering the vehicle driven by Egishian and the vehicle was followed into an alley where Rojas departed. (R. T. 54, 55, 57). The Cadillac left the area and visual contact was lost. (R. T. 55). At approximately 6:30 p. m. the 1941 powder blue Cadillac returned to the area with Egishian driving and Agobian still a passenger. (R. T. 55, 77). The vehicle came to a stop at which time Deputies Weldon and Velasquez with Agent Briggs approached the passenger's side, Weldon identifying himself as a deputy sheriff. (R. T. 55, 56, 76, 164). Deputy Stoops driving a vehicle occupied by Agent Rock and Deputy Henry pulled in behind the Cadillac and to its left side. (R. T. 78). Deputy Henry approached the driver's side of the Cadillac and identified himself as a sheriff and said "Freeze". (R. T. 76, 106, 164). Deputy Velasquez approached the vehicle on foot from the driver's side and stated "Sheriff's officers". (R. T. 165). At that point the Cadillac began moving rapidly in reverse out of the alley and continued in reverse for approximately one-half block after leaving the alley in an erratic manner until it came to rest after striking a parked vehicle. (R. T. 56, 57, 58, 79, 106). Deputies Weldon, Henry and Velasquez fired at the vehicle. (R. T. 63, 119, 166). Deputy Weldon and Agent Rock testified they saw nothing fall from the vehicle. (R. T. 65, 158). However, Deputy Stoops testified he observed an object thrown from the passenger's side of the Cadillac. (R. T. 79). Although Deputy Velasquez was firing his weapon (R. T. 166) he testified that he heard glass shattering as the Cadillac was backing up erratically. (R. T. 167). Deputy Velasquez testified that after the Cadillac came to rest he observed Agobian put both of his hands out and Agobian dropped a small package which Velasquez

instructed Agent Rock to retrieve. (R. T. 168, 169, 214). Agent Rock and Deputy Velasquez subsequently searched the vehicle and found no heroin. (R. T. 162, 196). Velasquez did, however, take two tablets from Agobian which were not heroin. (R. T. 181).

A powdery substance retrieved from the gutter by Agent Rock, (Exhibit 1C, R. T. 143) was analyzed and found to be one-half of one gram of heroin. (R. T. 15, 17).

Approximately one-half of one gram of heroin, (Exhibit 2B, R. T. 16, 18) was taken from a jar lid found 80 feet west of the place where the Cadillac struck the parked automobile. (R. T. 139, 142, 146, 183).

Approximately 3/10 of one gram of heroin. (Exhibit 3B; R. T. 16, 18) was scraped up from blotches of powder approximately 20 feet from the alley by Deputy Stoops. (R. T. 81, 140).

Glass fragments were retrieved by Agent Rock near the jar lid which was found approximately 80 feet west of the place where the vehicle occupied by petitioners came to rest. (R. T. 142, 185).

After his arrest, Egishian was interviewed by Deputy Henry in the presence of Agent Rock. (R. T. 109, 110). Egishian stated that he was going to meet a party by the name of Ronnie Rojas concerning a clothing deal. (R. T. 110) that Rojas lived in a house in the alley but Egishian did not know which one. They had gone to Worth's Clothing Store but could not make contact with Rojas so had come to his house. (R. T. 111). Egishian stated he picked the party up at Paul's Drive-in and

they proceeded to Worth's and from there to the location of the arrest. (R. T. 114). The record it totally devoid of any statement by Egishian to the officers concerning narcotics.

Agobian was interviewed by Agent Briggs at the sheriff's station. (R. T. 215). Agobian stated that he had come from Riverside that afternoon to visit his wife and had been driving around with Egishian looking for a person by the name of Ronnie. (R. T. 217). Agobian denied having been further west than Atlantic although Agent Briggs testified that Worth's Clothing Store is a mile and one-half to two miles west of Atlantic Boulevard. (R. T. 217). Agobian stated he had gone to the alley with Mr. Egishian and that he didn't know what had happened. When the officers approached, all of a sudden the car went in reverse and he ducked down in the passenger's seat. At about the same time he heard some glass breaking. (R. T. 217-219). With respect to Agobian, the record is also devoid of any statement by him to the officers concerning heroin.

Russell Goudy was called by Egishian (R. T. 227) and testified that he came out of his front door just after the vehicles collided (R. T. 233) and did not see anything thrown from the car nor did he see any hand reach out of the windows of the vehicle. (R. T. 232).

REASONS FOR GRANTING THE WRIT

1. The provisions of Title 21, United States Code, Section 174, making possession of a narcotic sufficient of itself to convict a person of transportation or concealment of narcotics known by the defendant to have been imported in the United States contrary to lawunless that

possession is explained to the satisfaction of the jury should be, and indeed must be, re-examined in light of the decision of the Court of Appeals for the Ninth Circuit in Russell v. United States, 306 F.2d 402 (9th Cir. 1962) and the decision and the language of this Court in United States v. Kahriger, 345 U.S. 22 (1953). In Russell v. United States, supra, the provisions of Title 26, United States Code, Section 5841 requiring registration of a firearm was struck down as being violative of the prohibition against self-incrimination guaranteed by the Fifth Amendment to the Constitution.

Petitioners can see no logical distinction between a rule of law requiring the possessor of a firearm to register the same and a rule of law requiring a defendant in a criminal case after the close of the government's evidence to explain possession of a narcotic. Certainly the dilemma of the persons involved in these separate situations are the same and the sanctions the same, namely, the invoking of a criminal penalty unless the individual takes some action which is or might be detrimental to his liberty or life.

It thus appears that the instant decision is implicitly in conflict with another decision in the very same circuit.

Furthermore, it would appear that the very vice which the majority opinion found did not exist with respect to the statute considered by the Court in United States v. Kahriger, supra, is certainly present in the statute of which petitioners herein complain. In considering the constitutionality of Title 26, United States Code (Supp. V) Section 3285, imposing a tax on persons in the business of accepting wagers, Mr. Justice Reed

spoke for the majority of the Court and sustained the statute noting:

> "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." (United States v. Kahriger, supra, pages 32-33).

By its very nature, the provisions of Title 21, United States Code, Section 174, of which petitioners complain, require testimony concerning past activities and require it under penalty of conviction. The unhappy plight of petitioners at the close of the government's case is graphically illustrated by the dissenting opinion of Mr. Justice Black with which opinion Mr. Justice Douglas concurred in United States v. Kahriger, supra, wherein it was noted:

> "***I am sure that it creates a squeezing device contrived to put a man in federal prison if he refuses to confess himself into a state prison as a violator of state gambling laws. The coercion of confessions is a common but justly criticized practice of many countries that do not have or live up to a Bill of Rights. But we have a Bill of Rights that condemns coerced confessions, however refined or legalistic may be the technique of extortion." (Page 37)

At the time of the events which transpired in Los

Angeles on March 28, 1962, California had in force and effect a statute which provides in part:

> "Except as otherwise provided in this division, every person who possesses any narcotic other than marijuana except on the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for not less than two years nor more than ten years, and shall not be eligible for release upon completion of sentence, or on parole, or on any other basis until he has served not less than two years in prison." Section 11500 Health and Safety Code, State of California (as amended Stats. 1959, c. 1112, p. 3193, section 3; Stats. 1961, c. 215, p. 1234, section 38; Stats. 1961, c. 274, p. 1301, section 1)

Petitioners respectfully submit that the provisions of Title 21, United States Code, Section 174, of which they complain are irreconcilable with the opinions of United States v. Kahriger, supra, and the opinion in Russell v. United States, supra. Such statute should be reviewed by the Court at this time.

2. Separate and apart from the problem of compulsory self-incrimination, the statute involved in the instant case should be carefully re-examined in light of the due process requirement of the Fifth Amendment of the Constitution of the United States. It would appear that in making possession alone sufficient evidence to

convict a person of transportation or concealment of a narcotic which had been imported into the United States contrary to law knowing that the narcotic had been so imported. Congress took a bootstrap approach to control what should be a problem for resolution by the individual states.

> "***Congress may not go beyond the powers delegated to the Federal Government under the Constitution of the United States. Congress may control traffic and narcotic drugs in accordance with its power over interstate and foreign commerce and under its tax power, but its ability to declare mere possession of a narcotic unlawful is doubtful." Griego v. United States, 298 F.2d 845, 848, (10th Cir. 1962).

It would appear that there is simply no rational connection between possession of a narcotic and knowledge that the narcotic had been imported into the United States contrary to law. The matter should be re-examined in light of Mr. Justice McReynolds' dissenting opinion in Casey v. United States, 276 U.S. 413 (1928) at page 420 where he noted:

> "The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary."

Appellants submit that a fair and objective re-evaluation of the provisions of Title 21, United States Code, Section 174 compel the conclusion that the observation of Mr. Justice McReynolds is correct.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted as to each petitioner.

Respectfully submitted,

PETER J. HUGHES

Counsel for Petitioners,
Albert Agobian and
Albert Egishian

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT AGOBIAN and ALBERT EGISHIAN,	)	
Appellants.	)	
	)	No. 18.635
vs.	)	Oct. 16, 1963.
UNITED STATES OF AMERICA,	)	
Appellee.	)	

Appeal from the United States District Court for the Southern District of California Central Division

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Before: BARNES and DUNIWAY, Circuit Judges; and PENCE District Judge

BARNES, Circuit Judge:

Appellants were convicted by a jury on one count of possession of heroin. 21 U.S.C. §174. Appellants urge, as grounds for reversal:

(1) That the last sentence of §174 requiring

defendant, once having been proved to have possession of narcotics to explain that possession, is unconstitutional.

(2) That the evidence is insufficient to sustain the conviction.

We have repeatedly upheld the constitutionality of § 174, as it applies to heroin and other opium derivatives, and to certain marijuana, at least. The Supreme Court of the United States has instructed us to do so. White v. United States, 9 Cir. 1963, 315 F.2d 113; Cellino v. United States, 9 Cir. 1960, 276 F.2d 941, 943-6; Yee Hem v. United States, 1925, 265 U.S. 178. But see Erwing v. United States, 9 Cir. 1963, ___ F.2d ___ (No. 18440, decided _____, 1963).

We have previously refused, and continue to refuse, to reverse our position where the factual situation is as it here exists.

As to the sufficiency of the evidence, we are required, of course, to examine the evidence and the inferences that can be drawn therefrom most favorable to the government on this appeal. Glasser v. United States, 1941, 315 U.S. 60; Sandez v. United States, 9 Cir. 1956, 239 F.2d 239.

Was there a reasonable inference at the time of appellants' arrest that appellants had had possession of the heroin? We are not limited in our factual analysis to the precise moment of arrest, or the moment that the officers announced themselves to the appellants. That Agobian's hands were seen to drop the heroin at the moment of panic and flight does not preclude a joint constructive possession of the narcotics by both parties

in the one automobile.

We quote from the factual recital in the government's brief:

> "Several officers testified that Mr. Ronald Rojas was a special employee of the government. The officers further testified that past experience had proven Mr. Rojas was reliable.
>
> The testimony concerning the handling of heroin on the evening of March 27, 1962, clearly proved that the appellants intended to possess and continue dealing in the illicit traffic of narcotics.
>
> * * *
>
> Mr. Rojas testified that on March 28, 1962, the appellants were going to deliver heroin. At the appointed date and location the appellants arrived.
>
> During the attempt by the appellants to escape, an object was thrown from the appellants' moving vehicle and the sound of glass breaking was heard. At this precise location, heroin was scraped from the asphalt pavement. Broken glass and a metal jar lid containing heroin were also recovered. That this heroin was in fact thrown from the appellants' vehicle is substantiated by the testimony of Deputy Sheriff Velasquez that no other broken glass was found along the route of the appellants' attempted escape. Nor were there any broken windows in the

appellants' vehicle. The only rational conclusion that can be drawn from these facts is that the heroin recovered on March 28, 1962 is the same heroin which was 'cut' by the appellants and stored in a glass jar with a metal lid on the evening of March 27, 1962.

> 'When at the approach of the officers the jar containing the heroin was thrown out of the window of appellant's residence it was shown that a moment earlier someone had had possession of narcotics. In the absence of explanation showing the possession to be lawful it was presumed unlawful under 21 U.S.C.A. Section 174. That the corpus delicti of the offense charged was fully established . . . '
>
> Cutchlow v. United States, 301 F.2d 295, 297 (9 Cir. 1962)."

The dominion and control exercised by the appellants jointly over the narcotics, if the government witnesses were to be believed (as they were, by the jury) is a far cry from the unknowledgeable "momentary grasp" mentioned by the reversing court in United States v. Santore, 2 Cir. 1960, 290 F.2d 51. The doctrine enunciated in that case is not here applicable, and we cannot follow it.

Nor are we convinced by arguments of amici curiae that the court's instruction, in the exact language contained in the statute (21 U.S.C. §174, paragraph 2) was contrary to 18 U.S.C. §3481.

A

The Supreme Court has ruled on the constitutionality of §174, paragraph 2. Lee Hem v. United States, supra We have long followed that rule. Mullaney v. United States, 9 Cir. 1936, 82 F.2d 638; Caudillo v. United States, 9 Cir. 1958, 253 F.2d 513. We cannot agree that it is unrealistic to argue that appellants could have offered evidence other than their own testimony, since there is nothing to indicate that evidence other than their testimony was available. Neither is there any evidence other testimony was not available. If the appellants had a defense which could explain their possession, such as lawful purchase, medical prescription or research, etc., etc., they could presumably have produced testimony of third parties to establish such facts.

Nor can we see the applicability of Johnson v. United States, 1943, 318 U.S. 189. How were appellants deprived of an intelligent choice of whether they should or should not explain their possession, if we assume they had an explanation?

B

If the court had not instructed on the second paragraph of §174, it would not have completely or properly instructed the jury. If the Supreme Court desires to reverse the present rule on the lawfulness of the presumption it has heretofore approved, it may do so, but we may not.

C

We may, but need not, notice on our motion errors to which no exception was taken in the trial court, and to which the trial judge's attention was not called, except under extraordinary and exceptional circumstances. We fail to find such exceptional circumstances in this case.

Affirmed.

(Endorsed) Opinion Filed October 16, 1963.

Frank H. Schmid, Clerk.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT AGOBIAN and ALBERT EGISHIAN, Appellants,	)	
vs.	)	No. 18,635
UNITED STATES OF AMERICA, Appellee	)	

APPEAL from the United States District Court for the Southern District of California, Central Division

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered October 16, 1963

APPENDIX C

Title 21, U.S.C. Section 174:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 627

ALBERT AGOBIAN AND ALBERT EGISHIAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 15-20) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered October 16, 1963. The petition for a writ of certiorari was filed November 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether this Court should reconsider its rulings upholding the validity of the presumption in 21 U.S.C. 174 arising from possession of narcotics.

STATEMENT

Petitioners were convicted in the United States District Court for the Southern District of California of the transportation and concealment of heroin and each was sentenced to imprisonment for ten years. On appeal the convictions were affirmed.

The sole question raised in the petition for a writ of certiorari is the validity of the statutory presumption arising from possession of narcotics, embodied in 21 U.S.C. 174.

ARGUMENT

The statutory presumption here involved, that proof of possession of narcotics, unexplained, will support a conviction for transportation and concealment of unlawfully imported narcotics, was upheld more than thirty years ago in *Yee Hem* v. *United States*, 268 U.S. 178, and was sustained on a more limited challenge to its scope in *Roviaro* v. *United States*, 353 U.S. 53, 63, n. 14. The presumption was also expressly recognized in *Harris* v. *United States*, 359 U.S. 19. This Court has repeatedly declined to reconsider its rulings with respect to the validity of the presumption, although recently asked to do so. *Jennings* v. *United States*, certiorari denied, 374 U.S.

856; see *Maestas* v. *United States*, (311 F. 2d 457), certiorari denied, 372 U.S. 936; *Sumpter* v. *United States* (309 F. 2d 536), certiorari denied, 373 U.S. 953. See also *United States* v. *Savage*, 292 F. 2d 264 (C.A. 2), certiorari denied, 368 U.S. 880; *United States* v. *Holmes*, 187 F. 2d 222 (C.A. 7), certiorari denied, 341 U.S. 948; *Stein* v. *United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844. It has likewise declined to review decisions upholding the more recently created presumption of illegal importation of marihuana (21 U.S.C. 176a) as against a contention that the inference arising from possession is less rational in the case of marihuana than with respect to opium. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 361 U.S. 853. There is no reason now for reconsideration of this settled line of decisions.

Petitioners' argument that the presumptions violate the self-incrimination clause of the Fifth Amendment was laid to rest in *Yee Hem*. The fact that no inferences are to be drawn from the failure of a defendant to take the stand does not mean that uncontradicted evidence by the government must be disregarded; every time the government makes out a *prima facie* case of guilty, a defendant who does not offer testimony will be at a disadvantage. As this Court said in *Yee Hem*, 268 U.S. at p. 185:

> The statute compels nothing. It does no more than to make possession of the prohibited article

> *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

There is no proper anology to the ruling of the Ninth Circuit in *Russell* v. *United States*, 306 F. 2d 402, involving 26 U.S.C. 5841, punishing failure to register a firearm, for there the very act of registering would necessarily require disclosure of illegal past conduct or present status. That deficiency does not exist here. The present statute compels no declaration which imports criminality. The government must prove possession beyond a reasonable doubt before the presumption can arise.

In *Tot* v. *United States*, 319 U.S. 463, this Court laid down as the governing test for the validity of a presumption whether there is a "rational connection between the fact proved and the ultimate fact presumed" (319 U.S. at pp. 467-468). It held that "where

the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." In view of the ever tightening controls on the narcotic traffic, the statutory inference arising from possession is now more closely related "to the circumstances of life as we know them" than it was thirty years ago. This is particularly true with respect to heroin; neither lawful importation nor lawful use of the drug is now possible.[1] Today, at least, the possessor of heroin may be assumed to know that it was imported illegally, and it is reasonable to suppose that he acquired it unlawfully. The presumption is therefore a rational one.

[1] 18 U.S.C. 1402 and 21 U.S.C. 173. The only legal use would be the minute amount permitted for scientific research. See 18 U.S.C. 1402. A recent decision of the Ninth Circuit referred to in the opinion below *(Erwing v. United States)* held the presumption unreasonable as applied to cocaine hydrochloride which is manufactured in the United States and used for medical purpose and as to which there was no proof in the record that the drug is imported.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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